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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1056

JOSEPH BERNARD DROBACK, *Petitioner*

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF AUTHORITIES CITED

Cases	Page
Bellis v. United States, 94 S. Ct. 2179 (1974)	10
Calandra v. United States, 414 U.S. 388, n.8 (1974)	6, 9, 11, 12
Gelbard v. United States, 468 U.S. 41, n.22 and 70	6, 7, 8, 9
In re Lochiatto, 497 F.2d 803 (1st Cir., 1974)	7, 9
In re Persico, 491 F.2d 1156 (2nd Cir. 1974)	7
In re Vigorito, 499 F.2d 1351 (2nd Cir. 1974)	8
Kastigar v. United States, 406 U.S. 441 (1972)	10
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)	6, 9, 10, 11, 12
United States v. Alter, 482 F.2d 1016 (9th Cir., 1973)	8
United States v. Batchelder, et al., Nos. 14579, 14580 and 14829	3, 4, 9
United States v. Chavez, 94 S. Ct. 1849 (1974)	7
United States v. Giordano, 94 S. Ct. 1820 (1974)	7

Statutes	
18 U.S.C.:	
§ 2515	2, 6, 8, 9
§ 2518(10)(a)	7
28 U.S.C.:	
§ 1254(1)	1
§ 1826	2, 4, 5, 7, 8
Fed. R. Crim. P., Rule 42(b)	8

Constitution	
United States Constitution:	
Fourth Amendment	2, 9, 10
Fifth Amendment	10

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No.

JOSEPH BERNARD DROBACK, *Petitioner*

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOSEPH BERNARD DROBACK petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming an order of the United States District Court for the Southern District of California that he make answers to questions put to him before a grand jury of the United States or be committed for civil contempt.

OPINION BELOW

The Opinion of the Court of Appeals, not yet officially reported, and the Memorandum Order of the District Court, are printed in the Appendix.

JURISDICTION

The Court of Appeals filed its opinion on December 26, 1974. It denied a timely Petition for Rehearing on January 24, 1975. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a grand jury witness whose subpoena and questioning are fruits of an illegal, but court-authorized wiretap, may assert and prove the illegality of the wiretap as just cause to refuse to answer questions.

2. Whether a grand jury witness whose subpoena and questioning are fruits of a house search already adjudicated as violative of the Fourth Amendment, may rely on the rule of *Silverthorne Lumber Co. v. United States* as just cause to refuse to answer questions.

STATUTES INVOLVED

18 U.S.C. § 2515:

PROHIBITION OF USE AS EVIDENCE OF INTERCEPTED WIRE OR ORAL COMMUNICATIONS.

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

28 U.S.C. § 1826:

RECALCITRANT WITNESSES.

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to

its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

STATEMENT

The issues raised by this petition originated with Petitioner's status as a defendant in criminal cases in the Southern District of California known as *United States v. Batchelder, et al.*, Nos. 14579, 14580 and 14829. On January 23, 1973, Petitioner was arrested as a defendant in those cases. The portions of the indictments which relate to Petitioner charge a conspiracy to distribute LSD. The government's evidence was gathered, *inter alia*, by means of a court-authorized wiretap during which narcotics agents overheard Petitioner speaking with another defendant, and by means of a search of Petitioner's house at the time of his arrest.

As a defendant in the *Batchelder* case, Petitioner moved to suppress the wiretap evidence and the tangible evidence seized from his house at the time of his arrest. The District Court granted Petitioner's motion to suppress tangible evi-

dence seized from his house, but denied the motion to suppress wiretap evidence. Since the government believed that only Petitioner had standing to suppress the tangible evidence seized at his house, and since it desired to use the evidence at the *Batchelder* trial, the government dismissed Petitioner as a defendant, but without prejudice to reindicting him on a similar charge. Immediately following the dismissal, Petitioner received subpoenas to appear as a trial witness against the other defendants in *Batchelder*, and before the grand jury. His grand jury appearance was scheduled for a date prior to the *Batchelder* trial.

On September 4, 1974, one day before the *Batchelder* trial began, Petitioner appeared before the grand jury, with a grant of "use" immunity, but refused to answer questions. He asserted various grounds for his refusal to testify, including that his subpoena and questioning were the fruits of the search of his home, already ruled illegal, and the fruits of the wiretap, which was illegally authorized and conducted. The District Court ordered Petitioner to answer the questions put to him before the grand jury. When Petitioner continued his objections, the Court set for hearing the government's motion for a finding of contempt pursuant to 28 U.S.C. § 1826.

On November 7, 1974, the District Court held the contempt hearing. In addition to argument, Petitioner offered as evidence the transcript and exhibits from the wiretap suppression hearings, held when Petitioner was a defendant in the *Batchelder* case prior to issuance of the grand jury subpoena (before a judge different than the one hearing the contempt motion). That offer of evidence was refused, on the ground that a grand jury witness has no standing to challenge a court-authorized wiretap.

The District Court found Petitioner in contempt for refusing to answer questions put to him on September 4, 1974, before the grand jury. Appendix A. Petitioner was sentenced to prison, pursuant to 28 U.S.C. § 1826, until he answered questions, or for the life of the grand jury, not to exceed 18 months.

The Court of Appeals affirmed the contempt conviction. Its short opinion (Appendix B) treats only one of the three issues raised by the briefs, and holds that a grand jury witness whose identity and possible knowledge of crime has been discovered through a court-authorized wiretap may not assert the illegality of the wiretapping as "just cause" for refusal to testify. On January 24, 1975, the Court of Appeals denied a Petition for Rehearing, and revoked bail.

On February 10, 1975, Petitioner moved in the District Court for an order modifying his sentence to recommend incarceration in a Federal institution instead of the San Diego County Jail, where Petitioner sleeps on the floor of a four-man cell containing six prisoners. The Department of Justice's Strike Force prosecutor opposed, on the ground that the purpose of Petitioner's incarceration is coercion, so that he should not be made "too comfortable." The Court denied the motion, leaving Petitioner in the County Jail.

On February 11, 1975, Petitioner's Application for Release on Bail Pending Review on Petition for Writ of Certiorari,* submitted to the Circuit Justice, was denied.

REASONS FOR GRANTING THE WRIT

The issues posed by this case are the thorny ones that this Court avoided in recent decisions dealing with grand jury witnesses: first, the right of a victim of court-author-

*U.S.S.C. No. A-637. The Solicitor General filed a memorandum in opposition to the bail application, on February 11, 1975.

ized wiretapping to assert the illegality of that wiretapping as a defense to civil contempt, reserved by the Court's opinion in *Gelbard v. United States,* 408 U.S. 41, 61 n.22 and 70 (White, J. concurring) and, second, the status of *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920), reserved by *Calandra v. United States,* 414 U.S. 388, 352-353 n.8 (1974). These issues must be taken up now. Two Courts of Appeals have issued opinions in conflict with 18 U.S.C. § 2515, which prohibits use before grand juries of evidence obtained from illegal wiretapping, while one Circuit Court of Appeals has attempted to follow *Gelbard v. United States, supra,* and the federal statute. On the other hand, the status of *Silverthorne Lumber Co. v. United States* appears not to have been decided by any Court of Appeals, even, unfortunately, by the Ninth Circuit in this case, where the appellate opinion ignores the issue totally.

Petitioner recognizes the reluctance with which this Court will take up issues so recently declined. Here, however, is a need to resolve a conflict between the Circuits and to require the Ninth Circuit to follow recent decisions of this Court. Perhaps most important, Petitioner is in jail, not for crime or contumacious behavior, but instead for asserting rights plainly available under decisions of this Court; the injustice done him must be remedied.

I. Congress Has Granted a Grand Jury Witness the Right to Refuse to Answer Questions Which Are Derived from Illegal Wiretapping, Whether or Not Court Authorized; the Right Is Limited Only by the Witness' Access to Evidence Useful to Prove the Wiretap Illegal.

This case presents the issue left open in *Gelbard v. United States:* Where the questions asked to grand jury witness are the fruits of an illegal, but court-authorized wiretap, and the witness refuses to answer, may the witness prove

the illegality of the wiretap as a defense to contempt? Here the witness, at his contempt hearing, offered as evidence the transcript and exhibits of a wiretap suppression hearing in which he participated as a defendant in a criminal case prior to receiving his grand jury subpoena. The District Court refused to admit the evidence, or to consider Petitioner's arguments as to the illegality of the wiretap, adopting the Second Circuit's decision in *In re Persico*, 491 F.2d 1156 (2nd Cir. 1974), for the proposition that a grand jury witness has no standing to assert illegality of court-authorized wiretapping as a defense to civil contempt. The Ninth Circuit affirmed, placing itself directly in conflict with the First Circuit case of *In re Lochiatto*, 497 F.2d 803, 806 (1st Cir., 1974) which holds that 18 U.S.C. § 2515 permits a grand jury witness to assert, as just cause for refusal to testify, that a court authorized wiretap was illegally authorized or executed.*

Petitioner's argument is simple. Congress gave him the right to refuse to answer a grand jury's questions for "just cause." 28 U.S. 1826(a). Moreover, he has a statutory right to appeal a District Court's determination that he lacks "just cause". *Gelbard v. United States* holds that illegal wiretapping in violation of Title III of the Omnibus Crime Control and Safe Streets Acts constitutes "just cause" if the questioning is based on the illegal wiretap. Petitioner

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In re Lochiatto permits a grand jury witness to challenge a court-authorized wiretap on the grounds enumerated in 18 U.S.C. § 2513(10)(a). Those grounds were recently explained in *United States v. Giordano*, 94 S. Ct. 1820, 1831-1832 (1974) and *United States v. Chavez*, 94 S. Ct. 1849 (1974). Each of the grounds asserted by Petitioner below involved provisions of the wiretap law "central . . . in the statutory scheme," i.e., no showing that other investigative means were inadequate or dangerous; complete failure to minimize intereceptions; and improper authorization by the Attorney General.

tried to present evidence showing the wiretapping illegal. The court refused to admit the evidence, denying Petitioner the right to present a defense, and denying him a meaningful appeal on the legality of the wiretap.

That Petitioner had previously litigated the legality of the wiretap as a defendant in a criminal case, and lost, does not make his claim of illegality insufficient as a defense, as the Solicitor General claims. See *Memorandum for the United States in Opposition to Petitioner's Application for Bail*, at 6. By dismissing without prejudice the indictment in the criminal case, the government made appellate review of that ruling inaccessible to Petitioner.* By refusing to admit into evidence at the contempt hearing the transcript and exhibits of the suppression hearing, the District Court made appellate review of the wiretap's legality impossible.**

Congress provided for appeals from contempt convictions. 28 U.S.C. § 1826(b). *Congress* provided for a hearing at which a grand jury witness may show just cause for his refusal to testify. Rule 42(b), Fed. R. Crim. P.; *United States v. Alter*, 482 F.2d 1016, 1020-1024 (9th Cir., 1973). *Congress* provided that the fruits of illegal wiretapping, court authorized or not, cannot be presented to the grand jury, and that a witness may so assert as a defense to contempt. 18 U.S.C. § 2515; *Gelbard v. United States, supra.*

The real issue is how far the defendant can go in proving the illegal wiretapping. On that issue, the Circuit Courts are divided.

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*Except as a criminal defendant or a grand jury witness, a victim of illegal wiretapping has no suppression remedy. *In re Vigorito*, 499 F.2d 1351, 1354-1355 (2nd Cir. 1974).

**Counsel for Petitioner told the District Court that, even if the court chose to rely on the prior suppression ruling, admission of the transcripts and exhibits from that suppression hearing as evidence at the contempt hearing was necessary for appellate review. Since the District Court believed a grand jury witness lacks standing to challenge a court-authorized wiretap, the Court refused to admit the evidence.

In re Lochiatto, faithful to the holding of *Gelbard v. United States*, allows a grand jury witness to assert and prove, if he can, the illegality of a court-authorized wiretap as a defense to contempt; the court achieves the necessary accommodation between the federal wiretap law and grand jury efficiency by limiting discovery available to a witness who must prove illegality. On the other hand, *In re Persico* and this case bar a grand jury witness from asserting or proving illegal wiretapping, except when the government admits illegal wiretapping or a court has already so held. Because the latter two cases, including this one, ignore the mandate of 18 U.S.C. § 2515, as interpreted in *Gelbard v. United States*, this writ should be granted and the judgment reversed.

II. Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920) Provides "Just Cause" for Refusal to Answer Questions Before a Grand Jury Which Are the Fruit of an Illegal Search When the Illegality of the Search Has Been Adjudicated Prior to Issuance of the Grand Jury Suppoena.

If *Silverthorne Lumber Company v. United States* has *any* vitality, as the Court asserted it did in *United States v. Calandra, supra,* 414 U.S. at 352-353 n.8, *Silverthorne Lumber Company v. United States* controls this case.

As a defendant in the *Batchelder* case, Petitioner moved to suppress evidence seized from him at the time of his arrest, including a notebook containing the telephone number of one Michael Green. The District Court ruled that search and seizure illegal, on Fourth Amendment grounds, and as a result the government dismissed the indictment against Petitioner.

After Petitioner's successful motion to suppress, he was subpoenaed as a grand jury witness. The first question asked him before the grand jury was "Who is Michael Green?"

Identity of the facts in this case with those in *Silverthorne Lumber Company v. United States* is apparent. The government indicted Petitioner, as it indicted the Silverthornes. Petitioner and the Silverthornes, as criminal defendants, moved to suppress tangible evidence. Like Silverthorne Lumber Company, Petitioner was not subpoenaed before the grand jury until after the court ruled on the motion to suppress. Thus, in both cases no delay of grand jury proceedings was required. In both cases, the government *chose* not to appeal the suppression ruling.

After losing the motion to suppress, the government sought the same evidence as had previously been suppressed, from a witness without any Fifth Amendment privilege against self-incrimination. In Petitioner's case, the privilege had been lost through the granting of "use" immunity. *Kastigar v. United States,* 406 U.S. 441 (1972). Silverthorne Lumber Company, of course, as a corporate entity never had a Fifth Amendment privilege. *Bellis v. United States,* 94 S. Ct. 2179, 2183-2184 (1974).*

In both cases, the potential witness claimed, and the government did not deny, that the subpoena was based on knowledge obtained from the illegal search. In *Silverthorne Lumber Company v. United States,* the court expressly recognizes the independent source rule:

> If knowledge . . . is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used

*To the extent a distinction exists, Petitioner's case is stronger than that of Silverthorne Lumber Company. Here, Petitioner himself litigated the Fourth Amendment issue as a criminal defendant. Silverthorne Lumber Company was never a criminal defendant, and relied on the suppression motion won by corporate officers, who were defendants. That Petitioner was not a criminal defendant at the time of his grand jury appearance in no way distinguishes him from the corporate entity, Silverthorne Lumber Company.

> by it in the way proposed . . . [T]he rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way. 251 U.S. at

In Petitioner's case, the government never suggested that Petitioner's grand jury subpoena and questioning have an independent source, until the Solicitor General raised the issue in this Court. Not once in the courts below did the government claim or even hint that the subpoena and questioning were other than fruits of the illegal search of Petitioner's house.

In any event, the independent source rule provides no distinction between *Silverthorne Lumber Company v. United States* and this case. In both instances, the issue is whether or not the knowledge that the subpoenaed information exists was obtained from the illegally seized evidence. See *United States v. Calandra, supra,* 414 U.S. at 352 n.8.

Finally, both Petitioner and Silverthorne Lumber Company were held in contempt, and arrived in this Court after appealing the contempt conviction. At the time of the alleged contempt, neither Petitioner nor Silverthorne Lumber Company were defendants in a criminal trial.

In contrast, the witness-contemptor in *United States v. Calandra, supra,* was not an indicted defendant, and could not invoke the exclusionary rule on the basis of that status. Moreover, Calandra moved to suppress evidence *after* issuance of the grand jury subpoena, requiring interruption of the grand jury proceedings. These distinguishing factors were crucial to the *Calandra* court in distinguishing *Silverthorne Lumber Company v. United States, supra,* 414 U.S. at 352-353 n.8.

Petitioner refrains from arguing policy to the court which so recently decided *United States v. Calandra*. Suffice it to say that it is an outrage for a citizen to be jailed for refusing to answer questions under circumstances identical to those set forth in *Silverthorne Lumber Co. v. United States* when that opinion gives him a clear right to so refuse. This Court should grant the petition for writ of certiorari, and reverse the judgment of the court below.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KIPPERMAN, SHAWN & KEKER
By: JOHN W. KEKER
Attorneys for Petitioner

(Appendix follows)

Appendix

Opinion of the District Court

United States District Court
Southern District of California

Misc. No. 439

In Re
Joseph Bernard Droback,
a Grand Jury witness.

ORDER ADJUDGING GRAND JURY WITNESS IN CONTEMPT

On August 29, 1974, the government moved that this court immunize witness Joseph Bernard Droback pursuant to the "use and derivative use" immunity statute, 18 U.S.C. §§ 6002, 6003. Use immunity was so granted, and on September 4, 1974, Droback was duly brought before a Federal Grand Jury to answer questions regarding possible violations of the Federal Controlled Substances Act. Droback refused to answer all questions put to him, whereupon government counsel, the witness, and John W. Keker, counsel for the witness, appeared before this court. After a review of the Grand Jury proceedings and of the questions put to the witness before the Grand Jury, this court directed Droback to return to the Grand Jury and respond to the questions. Droback again refused to answer all questions put to him before the Grand Jury.

On September 12, 1974, this cause came to be heard on the motion of Charles J. Fanning of the United States Department of Justice for an order adjudging witness Droback in civil contempt of court for refusing to testify before the Grand Jury without just cause. This court ordered that contempt proceedings against Droback be continued until after said witness was called to testify at the trial of Indictment No. 14829.

The government then represented that it would not call Droback as a witness at said trial, and accordingly, the contempt proceedings were restored to the calendar for further hearing on October 10, 1974. At that hearing, the government disclosed that its representation did not pertain to the possibility that Droback could be called as a "rebuttal witness" at the trial of the aforementioned indictment. Accordingly, the civil contempt proceeding was continued pending the conclusion of all trial testimony.

On November 7, 1974, after the conclusion of all testimony in case No. 14829, this cause again came to be heard on the motion of Mr. Fanning of the Department of Justice for an order adjudging witness Droback in civil contempt. The court received evidence and heard argument by counsel for the government and by John W. Keker, counsel for the witness.

Pursuant to 28 U.S.C. § 1826(a), It Is Adjudged that witness Droback is in civil contempt of court for refusing without just cause to testify before the Grand Jury as directed by the order of this court. It Is Ordered that witness Droback be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment until such time as he is willing to give testimony as required before the Grand Jury, or for the term of the present Grand Jury, including extensions, such confinement to be not longer than eighteen (18) months.

Dated: November 11, 1974.

/s/ EDWARD J. SCHWARTZ
Edward J. Schwartz,
Chief Judge
United States District Court

Opinion of the Court of Appeals

United States Court of Appeals
for the Ninth Circuit

Filed Dec 26 1974

No. 74-3096

In re Grand Jury Witness,
Joseph Bernard Droback,
Appellant,

v.

United States of America,
Appellee.

OPINION

Appeal from the United States District Court
for the Southern District of California.

Before: KOELSCH, CHOY, and GOODWIN, Circuit Judges.

PER CURIAM:

Joseph Bernard Droback appeals an order adjudging him in contempt of court for refusing to testify before a federal grand jury after the court granted him immunity under 18 U.S.C. §§ 6002-6003, and ordered him to testify. We affirm.

The only issue is whether a grand-jury witness whose identity and possible knowledge of crime have been discovered through a court-ordered wiretap may, by refusing to testify, delay the proceedings while he conducts a plenary challenge of the electronic surveillance. He may not. *In re Persico*, 491 F.2d 1156 (2d Cir.), *cert. denied*, ... U.S. ..... (1974).

Droback contends that *In re Lochiatto*, 497 F.2d 803 (1st Cir. 1974), compels a contrary result. We disagree. But even if *Lochiatto* conflicts in part with *Persico*, we believe that *Persico* more accurately reflects congressional policy authorizing a narrow range of court-ordered wiretaps than does *Lochiatto*.

Droback's interpretation of the cases would require the grand-jury investigation of any witness to come to a halt any time the witness chooses to assert some latent defect in the court order or its underlying papers, or some defect in the conduct of the surveillance.

We decline to hold that an immunized witness can stop the investigation, assert his list of objections, proceed with comprehensive discovery, and ultimately have a full-fledged suppression hearing to determine whether or not the court order allowing the surveillance or the manner of its execution is vulnerable to some attack.

The immune witness is, in effect, seeking to convert his contempt proceeding into a bystander's action to test the legality of a surveillance program which is likely to produce evidence against one or more of his associates. We doubt that Congress intended to permit such delays, and, in the absence of Supreme Court direction to do so, we will not reach that result.

Affirmed.